U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 May 2006

CASE NO.: 2005-LHC-1019

OWCP NO.: 7-170809

IN THE MATTER OF

MICHAEL P. HIMEL,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS,
Employer

APPEARANCES:

V. William Farrington, Jr., Esq.,
On behalf of Claimant

Frank J. Towers, Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 *U.S.C.* §901, *et seq.*, brought by Michael P. Himel ("Claimant") against Northrop Grumman Ship Systems ("Employer") and Avondale Industries, Inc. ("Carrier"). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on January 31, 2006 in Covington, Louisiana. At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions.[1] Claimant testified and introduced twenty nine (29) exhibits, which were admitted, including: LS 202, 206, 207 forms; first aid reports from Northrop Grumman; medical reports and assessments from Dr. Billings and Dr. Waring; MRI reports and CT report from Diagnostic Imaging Services; letter from Catherine Verdone to Dr. Billings; list of employers to which Claimant applied; letter from Gregory L. Theriot; letter from Shiloh Hicks; and a letter from Cherise A. Tabor. Employer introduced nineteen (19) exhibits, which were admitted,

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___. Employer's and Claimant's exhibits also contained many duplicates as indicated below. Where duplicates exist, references will generally be made to only one exhibit. The following were duplicates: CX 17 and EX 4, p. 7; CX 19 and EX 4, p. 9; CX 21 and EX 4, p. 28; CX 22 and EX 1, p. 11; CX 23 and EX 1, p. 8; and CX 24 and EX 1, p. 5, 6, 7.

including: LS 18, 200, 202, 206, 207, 280 forms; Claimant's discovery responses; medical records from Avondale Shipyard, Dr. Waring, Dr. Billings, and Dr. Sweeney; Claimant's personnel and payroll file from Avondale Shipyard; records of medical and indemnity payments to Claimant from Employer; records of surveillance on Claimant; deposition transcripts of Claimant, Dr. Billings, Dr. Waring and Dr. Sweeney; vocational rehabilitation reports; records from Chiropractic and Physical Therapy Clinic; and records from a personal injury lawsuit involving Claimant.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the admitted evidence, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

The parties stipulated and I find:

1. Claimant injured his lower back on September 10, 2002, during the course and scope of his employment with Employer

2. Employer was advised of the injury on September 10, 2002.

3. Employer filed a Notice of Controversion on June 16, 2004, November 30, 2004, and January 26, 2005.

4. An informal conference was held on January 20, 2005.

5. Claimant's average weekly wage at the time of his September 10, 2002 injury was $656.62.

6. Employer paid Claimant temporary total disability from June 25, 2003 to June 22, 2004; permanent partial disability from June 23, 2004 to the present; and medical benefits from September 18, 2002 to Present.

7. As a result of his September 10, 2002 injury, Claimant suffered a permanent partial disability to his lower back with Claimant reaching maximum medical improvement on March 10, 2004.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of injury;

2. Suitable alternative employment;

3. Earning capacity; and

4. Attorney fees and compensation under Section 28 of the Act.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a 59 year old male born on May 12, 1946 who currently resides in Houma, Louisiana. (Tr. 12; 26). Claimant possesses a high school education. (Tr. 13; EX 14, p. 11). In September 1969 Claimant began work with Employer as a tacker. (Tr. 13-14; EX 10, p. 13). Claimant continued his employment with Employer from September 1969 up to and until June 24, 2003. (EX 10, p. 12). For the last five years of his employment with Employer, Claimant worked as an electrical layout fitter. (EX 10, p. 13). It was in his capacity as an electrical layout fitter that Claimant suffered a back injury on September 10, 2002. (Tr. 15-16).

On September 10, 2002, Claimant and a coworker arrived at a job site to perform work on a ship. (Tr. 15; EX 10, p. 20). Claimant climbed a ladder to access the work site on the ship and lowered a rope to his coworker so that his coworker could attach his tool bucket to the rope, permitting Claimant to hoist the bucket onto the ship. (*Id.*). Claimant then repeated the process so that he could hoist a portable welding machine onto the ship. (Tr. 16; EX 10, p. 20). Once the tools and equipment were aboard the ship, Claimant lifted both the tool bucket and welding machine, intending to carry them to the work site. (Tr. 16; EX 10, p. 20-21). While lifting the tool bucket and welding machine, Claimant immediately felt a pain in his back. (Tr. 16; EX 10, p. 21).

After experiencing pain in his back, Claimant went to Employer's first aid facility. (Tr. 16; EX 10, p. 23). Claimant initially received treatment from a nurse at the first aid facility. (CX 2, p. 1; EX. 10, p. 23). The nurse placed an ice pack on Claimant's back for approximately twenty (20) minutes after which Claimant was told he could go back to work. (Tr. 16; CX 2, p. 1; EX 10, p. 23). While preparing to leave the facility for work, Claimant was asked how he felt. (Tr. 16; EX 10, p. 23). Claimant informed the first aid facility staff that he felt worse than when he originally came into the facility. (*Id.*). Consequently, the first aid facility physician, Dr. Corcoran, met with and examined Claimant. (CX 2, p. 2; EX 10, p. 23). Dr. Corcoran took some x-rays of Claimant's back, gave Claimant some ibuprofen, and recommended that Claimant return to full duty work. (CX 2, p. 2). According to Dr. Corcoran, Claimant suffered a strained muscle. (EX 5, p. 17).

On September 16, 2002, Dr. Corcoran met again with Claimant. (CX 2, p. 2). Claimant informed Dr. Corcoran that he had taken the past three days off from work so that he could rest his back as he continued to experience pain. (CX 2, p. 2). Dr. Corcoran recommended Claimant be assigned to light duty work for a while, (CX 2, p. 2; CX 2, p. 5; EX 10, p. 24), and requested a MRI of Claimant's lumbar spine. (CX 2, p. 3). Dr. Corcoran next met with Claimant on September 24, 2002. (CX 2, p. 4). Following his examination of Claimant on this date, Dr. Corcoran recommended Claimant continue light duty work. (CX 2, p. 4; CX 2, p. 6). On December 23, 2002, Dr. Corcoran again met with and examined Claimant. (CX 2, p. 4). Following this examination, Dr. Corcoran recommended Claimant return to full duty work and noted that Claimant might need an orthopedic consultation. (CX 2, p. 4).

Claimant met with an orthopedic surgeon, Dr. Billings, on January 21, 2003. (EX 11, p. 7). Dr. Billings reviewed a radiographic report regarding the September 19, 2002 MRI of Claimant's lumbar spine. (EX 5, p. 17; EX 11, p. 12). Dr. Billings concluded from the radiographic report and his physical examination of Claimant that Claimant suffered from a lumbar strain with underlying disc disease. (EX 5, p. 17). Dr. Billings concluded further that Claimant suffered the lumbar strain on September 10, 2002 since Claimant's acute pain related to that date, the day of Claimant's accident. (EX 11, p. 14). Dr.

Billings recommended Claimant engage in light duty activities with a gradual increase in activities as permitted without additional pain. (EX 5, p. 17).

Claimant began light duty work for Employer after September 10, 2002. (EX 10, p. 25). Initially, Claimant worked in the same position he held prior to his injury on September 10, 2002, but just did not perform any sort of heavy lifting or any thing of that nature. (EX 10, p. 25). Then after receiving information as to his work restrictions from Dr. Corcoran, Claimant helped with some cable work at Waggaman. (EX 10, p. 25). Claimant's work restrictions at this point confined him to light duty work and in particular no lifting of anything over twenty-five (25) pounds. (CX 2, p. 5-6).

After Waggaman, Claimant worked in Employer's respirator room where he cleaned and reassembled respirators for use by Employer's other employees. (Tr. 17; EX 10, p. 26). At this time, Claimant's work restrictions as specified by Dr. Billings included no stooping, squatting, lifting over ten (10) pounds, kneeling, bending at the waist, prolonged standing, as well as alternate standing and sitting to one (1) hour at a time. (CX 2, p. 7-9; EX 11, p. 30). Claimant worked in Employer's respirator room for fifty-six (56) days after which he was told there was no more light duty work available. (Tr. 17; EX 10, p. 26-27). Claimant has not worked since June 24, 2003, his last day of light duty work with Employer. (EX 10, p. 17, 27).

Claimant continues to receive treatment from Dr. Billings, who recommended that Claimant also see Dr. Waring for an epidural steroid injection. (CX 9, p. 1). Claimant met with Dr. Waring on September 25, 2003 for the purposes of receiving an epidural steroid injection. (EX 4, p. 2). Claimant has continued to receive treatment from Dr. Waring as recently as July 18, 2005. (EX 12, p. 26).

Payroll records show Claimant making $34,713.88 with Employer in 2002 followed by earnings for 2003, 2004 of $17,828.31 and $2,802.38 respectively. (EX 8, p. 2). From June 25, 2003 to June 22, 2004 Employer paid Claimant temporary total disability at a weekly compensation rate of $437.74. (ALJX 1, p. 1). From June 23, 2004 up to and until the present, Employer has paid Claimant permanent partial disability at a weekly compensation rate of $264.40. (ALJX 1, p. 1).

B. Labor Market Surveys

Vocational counselor, Gary J. Ordes, prepared a vocational assessment of Claimant on June 11, 2004 to determine Claimant's employment potentiality. (EX 14, p. 10). In order to prepare this assessment, Mr. Ordes reviewed and relied upon medical records from Dr. Billings as well as a second medical opinion provided at Employer's behest by a Dr. Sweeney. (*Id.*). Mr. Ordes noted physical limitations reported by Claimant including lifting, hearing, sitting, walking, standing for long periods, reaching, and numbness in his foot on occasion, bending, kneeling, and sleeping. (EX 14, p. 11). Mr. Ordes found Claimant to have a high school education having graduated from Thibodeaux High School in 1966 and possessing reading and spelling skills at high school level and arithmetic skills at the 7th grade level. (EX 14, p. 11-12). Claimant's past work as an electrical layout fitter, tacker, delivery driver (furniture), stocker (retail store), and maintenance worker (hospital) Mr. Ordes classified as a heavy work and semi-skilled to skilled in nature. (EX 14, p. 12).

As for Claimant's medical records, Mr. Ordes noted that Claimant's prescribed medications included Lidoderm patches for pain, Bextra for arthritis, Vicodin for pain, Zanax for nerves, and a muscle relaxant, as well as a medication for high blood pressure, high cholesterol and a stomach condition. (EX 14, p. 10). Mr. Ordes observed that in Dr. Billings' opinion Claimant could return to

work to a sedentary to light position on a permanent basis so long as the position fit within the parameters of Claimant's physical restrictions of alternating sitting, standing and walking for approximately one (1) to two (2) hours with rest, no lifting of anything over ten (10) pounds and no driving. (*Id.*). Based upon all these factors Mr. Ordes opined that should Claimant return to the work force, he would need to do so in an entry level sedentary to light duty position. (EX 14, p. 12).

Mr. Ordes identified the following positions as suitable employment for Claimant based upon Claimant's age, education and work history, and physical capabilities as delineated by Dr. Billings and determined as available as of the date of Claimant's MMI (March 10, 2004): gate guard with Hub Enterprises (full-time position, wage of $6.00 per hour, occasional walking, standing and sitting); and cake decorator (40 hours a week, wage of $6.00 per hour, applying icing to cakes and creating designs and lettering according to customers' requests, no experience necessary employer would train). (EX 14, p. 13). Mr. Ordes also identified the following positions as suitable for Claimant based upon his age, education and work history, and physical capabilities as delineated by Dr. Billings and determined as available as of the week of June 7-12, 2004: security guard listing from Job Service (40 hours per week, wage of $7.00 per hour, sedentary to light duty, un-armed position, employer would train, background check required); housing counselor 1 with Houma Terrebonne Housing Authority (40 hours, wage of approximately $6.50 per hour, sedentary to light duty, no specialized experience or training required, would counsel residents in need of securing and retaining adequate housing); and dispatcher with A-1 Taxi (full-time, wage of $6.00 per hour, sedentary to light duty). (EX 14, p. 13, 15-16).

Vocational counselor, Dot Moffett-Douglas, prepared a vocational assessment and LMS update of Claimant on August 11, 2005 to determine Claimant's employment potentiality. (EX 14, p. 6). In preparing this assessment, Ms. Moffett-Douglas relied on medical records from Dr. Billings and Dr. Sweeney as well as information contained in the vocational assessment prepared on June 11, 2004 by Gary J. Ordes. (EX 14, p. 6-7). Ms. Moffett-Douglas noted physical limitations of Claimant as specified by Dr. Billings as including an ability to work sedentary to light duty, alternating sitting, walking and standing at one (1) to two (2) hour intervals and no driving. (EX 14, p. 6). Ms. Moffett-Douglas observed that Dr. Billings classified Claimant's condition as spondylosis with left lumbar pain and noted that Claimant continued to take Vicodin, Flexeril and Mobic. (*Id.*). Ms. Moffett-Douglas further noted that Dr. Sweeney classified Claimant's condition as lumbar spondylosis and stenosis with lumbar strain and identified Claimant's physical restrictions as sedentary to light duty with no prolonged standing, sitting or bending or lifting of anything over thirty-five (35) pounds. (*Id.*).
Ms. Moffett-Douglas contacted four (4) of the five (5) employers identified in Mr. Ordes June 11, 2004 vocational assessment. (EX 14, p. 7). Following is a summary of the availability of those positions as described by Ms. Moffett-Douglas: gate guard with Hub Enterprises, no current positions available in the Houma area. (*Id.*). However, there was a position available in Patterson, Louisiana but that would require transportation to the employment location of over 30 miles from the Houma area. (*Id.*). Security guard from Job Service, indicated that Claimant had registered for job placement on August 21, 2004 and stated that no other job specific details were available. (*Id.*). Housing counselor 1 with Houma Terrebonne Housing Authority, indicated that Claimant submitted an application and that there was a current opening for a van driver, which position Claimant could not consider because of his physical restrictions. (*Id.*). Dispatcher with A-1 Taxi, company purchased by Tommy's cab, no positions currently available. (*Id.*).

Following is a summary of the positions Ms. Moffett-Douglas identified as suitable for Claimant based upon his age, education and work history, and physical restrictions as delineated by Dr. Billings and determined as available as of the week of August 8, 2005: unarmed security guard with Vinson

Guard Service (full-time position, wage of $6.00 per hour, light duty, employer would train, able to accommodate alternating sitting, standing and walking, no driving required); auto service writer with Wal Mart (full-time position, wage of $5.80 per hour, would train to greet customers, write auto service repair orders and schedule appointments for service, would train on basic computer entry, able to accommodate alternating sitting, standing, and walking); and cashier unarmed guard with Tracer Security (32 hours per week, wage of $6.50 per hour, employer would train, cashier is sedentary employment, security guard is light duty employment able to accommodate alternating sitting, standing and walking). (EX 14, p. 7-8).[2]

Ms. Moffett-Douglas prepared a labor market survey regarding Claimant from the date of MMI indicated as being April 7, 2004 on August 16, 2005. (EX 14, p. 17). In preparing this survey, Ms. Moffett-Douglas relied on medical records from Dr. Billings and Dr. Sweeney as well as information contained in the previous vocational assessments prepared regarding Claimant. (EX 14, p. 17-18). Ms. Moffett-Douglas noted physical limitations of Claimant as specified by Dr. Billings as including an ability to work sedentary to light duty, alternating sitting, walking and standing at one (1) to two (2) hour intervals and no driving. (EX 14, p. 17). Ms. Moffett-Douglas further noted Claimant's physical restrictions as indicated by Dr. Sweeney as being sedentary to light duty with no prolonged standing, sitting or bending or lifting of anything over thirty-five (35) pounds. (*Id.*).

Following is a summary of the positions Ms. Moffett-Douglas identified as suitable for Claimant based upon his age, education and work history, and physical restrictions as delineated by Dr. Billings and determined as available as of the date of Claimant's MMI indicated as being April 7, 2004: gate guard with American Citadel (full-time position, wage of $5.50 per hour, employer would train, light duty, able to accommodate alternating sitting, standing and walking, no pushing or pulling of anything over 20 pounds); dispatcher with A-1 Taxi (40 hours a week, wage of $5.50 per hour, employer would train, would answer the phone and relay information to drivers as well as calculate mileage and charges, sedentary employment able to accommodate alternating sitting, standing and walking and no pushing or pulling of anything over ten pounds, no driving required); and front desk clerk with Red Carpet Inn (full-time, wage of $6.50 per hour, employer would train, would check customers into motel, assign rooms, collect payments, and answer phone to make reservations, sedentary employment able to accommodate sitting, standing and walking behind front desk, no pulling, carrying, lifting or pushing of anything over 10 pounds). (EX 14, p. 18-19).

C. Deposition Testimony of Dr. Charles R. Billings

Dr. Billings has provided medical treatment to Claimant periodically since 1993. (EX 11, p. 7). Claimant received medical treatment from Dr. Billings prior to any treatment received as a result of Claimant's September 10, 2002 accident for such physical ailments as a broken foot, back pain, left thigh pain most likely attributable to Claimant's broken foot, shoulder pain, and some neck pain. (EX. 11, p. 9-10). On January 21, 2003 Claimant presented himself to Dr. Billings complaining of pain in his lower back. (EX 11, p. 11). Dr. Billings examined Claimant and found Claimant to have reduced range of motion, pain in his lower back, and no objective spasms. (*Id.*). Dr. Billings also reviewed a radiographic report regarding a MRI of Claimant's back taken on September 19, 2002. (*Id.*). Dr. Billings found evidence of multi-segment disc and joint disease in Claimant's low back and concluded that Claimant suffered from lumbar strain with underlying lumbar disc disease. (EX 11, p. 12-13). Dr.

[2] Ms. Moffett-Douglas also provided a vocational assessment and LMS update prepared August 12, 2005. (See, EX 14, p. 1). This assessment and update essentially mirrors the assessment and update of August 11, 2005.

Billings opined that Claimant's lumbar strain was attributable to his accident on September 10, 2002 because Claimant's acute pain related to the accident as described by Claimant. (EX 11, p. 14). Dr. Billings recommended Claimant continue light duty work as well as begin a course of treatment including physical therapy and medications. (EX 11, p. 12-13).

Dr. Billings testified that he next examined Claimant on March 18, 2003. (EX 11, p. 14). According to Dr. Billings, Claimant's condition had not really changed from Claimant's prior appointment with him. (EX 11, p. 14-15). Following this examination, Dr. Billings recommended Claimant continue light duty work and physical therapy. (EX 11, p. 16-17). Dr. Billings also prescribed Vicodin for pain and Indomethacin an anti-inflammatory medication for Claimant. (*Id.*). Dr. Billings next met with Claimant on May 20, 2003. (EX 11, p. 17). At this appointment, Claimant complained of persistent back pain that worsened with sitting or standing. (*Id.*). Dr. Billings noted during this examination that Claimant was involved in a motor vehicle accident on May 2, 2003. (EX 11, p. 17-18). Dr. Billings opined that this motor vehicle accident may have aggravated or exacerbated Claimant's back condition. (*Id.*). However, Dr. Billings concluded that the motor vehicle accident did not precipitate a dramatic change in Claimant's condition. (EX 11, p. 18). At the close of this exam, Dr. Billings diagnosed Claimant's back condition as post-traumatic exacerbation of lumbar spondylosis. (*Id.*). Dr. Billings recommended continued light duty work and continued conservative or non-operative treatment. (EX 11, p. 19-20).

Claimant next had an appointment with Dr. Billings on August 15, 2003. (EX 11, p. 21). Dr. Billings testified that Claimant reported to him that his condition had worsened to such a point that he was not physically able to work. (*Id.*). Dr. Billings recommended that Claimant not engage in any sort of employment, and that he continue to take medication including Vicodin and Bextra, a non-steroidal drug as well as continue with his conservative therapy. (EX 11, p. 22-23). Dr. Billings also recommended Claimant receive an epidural steroid injection. (EX 11, p. 23). Claimant next met with Dr. Billings on September 26, 2003. (EX 11, p. 24). Dr. Billings noted that Claimant had recently received an epidural steroid injection and that Claimant's complaints regarding his back pain seemed to have improved. (*Id.*). At this time, Dr. Billings ordered a myleogram of Claimant's back. (*Id.*). According to Dr. Billings, Claimant's myleogram showed extradural impressions at multiple segments, including L2-3 and 3-4 with central stenosis. (EX 11, p. 24-25). After reviewing the myleogram, Dr. Billings discussed a surgical treatment, decompression and fusion, with Claimant as a surgical option Claimant might wish to pursue. (EX 11, p. 25).

Dr. Billings testified that after the September 26, 2003 appointment, he next saw Claimant on January 9, 2004. (EX 11, p. 26). Dr. Billings noted that Claimant still exhibited reduced range motion and still complained of pain in his lower back. (EX 11, p. 27). Hence, according to Dr. Billings, he most likely recommended that Claimant not attempt to engage in any kind of gainful employment. (*Id.*). Dr. Billings testified that he agreed with and endorsed information provided by a member of his staff in response to a letter from Catherine Verdone, a certified occupational health nurse and case manager with FARA Healthcare Management. (EX 11, p. 30-31). The letter from Ms. Verdone requested information regarding Dr. Billings' opinion as to whether or not Claimant had reached MMI and whether or not a functional capacity evaluation could be scheduled. (*Id.*). Dr. Billings testified that he agreed that Claimant had reached MMI as of March 2004. (EX 11, p. 32). Dr. Billings further stated that at that time Claimant was capable of engaging in sedentary to light duty work provided Claimant's pain was under reasonable control. (*Id.*).

Claimant met with Dr. Billings again on April 5, 2004. (*Id.*). At this appointment, Claimant complained to Dr. Billings of back and neck pain. (EX 11, p. 32-33). Dr. Billings testified that following his examination of Claimant he determined that Claimant's condition remained unchanged. (EX 11, p. 33). Dr. Billings noted that at that time he had no contradictions to Claimant engaging in sedentary to light work activities. (*Id.*). Claimant's next appointment with Dr. Billings took place on July 29, 2004. (EX 11, p. 35). Dr. Billings testified that Claimant's condition remained unchanged but that Claimant believed the epidural steroid injections were helping to relieve his pain. (EX 11, p. 36). Dr. Billings again stated that he had no contradictions to Claimant engaging in sedentary to light duty work. (*Id.*). Claimant next met with Dr. Billings on November 19, 2004. (EX 11, p. 37). Dr. Billings testified that at this appointment Claimant complained of back pain, neck pain, and dizziness. (*Id.*). Claimant's complaint of dizziness was a new complaint and Dr. Billings testified that the dizziness might have been attributable to Claimant's medication. (EX 11, p. 38). Dr. Billings again presented surgery to Claimant as an elective option in his treatment and stated that he was of the opinion that Claimant could engage in sedentary to light duty work. (*Id.*).

Dr. Billings met with Claimant again on March 18, 2005, June 14, 2005, and August 15, 2005. (EX 11, p. 38-40). According to Dr. Billings, Claimant's condition remained constant as did the recommended course of treatment. (*Id.*). Dr. Billings also testified that Claimant could engage in sedentary to light duty work so long as Claimant's symptoms were under reasonable control and Claimant would not have to drive for longer than 45 minutes at a time. (EX 11, p. 38-42). In addition, Dr. Billings reviewed the labor market surveys regarding Claimant and determined that Claimant could meet the tasks required of each position except for the position of cake decorator. (EX 11, p. 48-50).

At the time of his last appointment with Dr. Billings, Claimant's prescribed medications included Vicodin, Mobic, an anti-inflammatory drug, and a different muscle relaxant prescribed by Dr. Waring. (EX 11, p. 56). Dr. Billings stated that side effects of Vicodin include drowsiness or disorientation, but patients who chronically tend to take such medications do not experience these side effects as often as a patient who take the medications infrequently. (*Id.*). Other side effects include constipation, nausea, and dizziness. (*Id.*).

D. Deposition Testimony of Dr. Patrick Houston Waring

Dr. Waring initially met with Claimant on September 25, 2003. (EX 12, p. 7). Claimant went to Dr. Waring for treatment upon a referral from Dr. Billings. (*Id.*). According to Dr. Waring, Claimant presented himself complaining of pain in his lower back and pain in his legs as well as neck pain. (EX 12, p. 9). In his initial evaluation of Claimant, Dr. Waring reviewed Claimant's pain history, medications and MRI report. (EX 12, p. 8). Dr. Waring also performed a physical exam of Claimant. (*Id.*).

According to Dr. Waring, Claimant informed him that his leg and back pain resulted from a work related lifting injury. (EX 12, p. 9). Dr. Waring testified that he could not recall whether or not Claimant informed him of his involvement in a motor vehicle accident on May 2, 2003. (EX 12, p. 10). However, Dr. Waring testified further that such information would not have had a significant impact on his determination as to an appropriate course of treatment for Claimant. (EX 12, p. 10-11). Dr. Waring stated that a patient's history is not as important as a report as to the character of the patient's pain. (*Id.*). Understanding a patient's complaint as to pain is more important, according to Dr. Waring, than a determination as to the cause of the pain. (EX 12, p. 10). Such understanding is ultimately more significant in making a final determination as to a treatment for the patient's pain. (EX 12, p. 10-11).

Therefore, Dr. Waring testified that any omission of a motor vehicle accident from Claimant's history would have no bearing on his treatment and diagnosis of Claimant. (EX 12, p. 11).

Dr. Waring concluded from his evaluation and exam of Claimant that Claimant suffered from low back pain with some lower extremity pain. (EX 12, p. 11). Dr. Waring agreed with Dr. Billings recommendation of an epidural steroid injection performed by way of a transforaminal approach on the left side at the L4 and L5. (*Id.*). Besides performing the epidural steroid injection, Dr. Waring also administered a psychological test called a Brief Battery for Health Improvement II to Claimant. (EX 12, p. 12). The purpose of a Brief Battery for Health Improvement II, according to Dr. Waring, is to examine factors that might exacerbate a patient's pain condition. (*Id.*). Dr. Waring testified that the results of Claimant's Brief Battery for Health Improvement II indicated that Claimant was focused on compensation meaning that Claimant was concerned about compensation and that employment might interfere with recovery. (EX 12, p. 14). Dr. Waring testified further that Claimant's results also showed that Claimant has sleeping problems, worries about becoming dependent on prescription medications, feels like he can't work, and feels that his pain never changes indicating a high anxiety level. (EX 12, p. 15-17). Dr. Waring concluded that Claimant's results indicated that his complaints of pain were not questionable or disproportionate to the objective findings. (EX 12, p. 33).

Following his September 25, 2003 appointment with Claimant, Dr. Waring administered an epidural steroid injection to Claimant on October 17, 2003, October 27, 2004, December 3, 2004, March 30, 2005, April 28, 2005, and June 30, 2005. (EX 12, p. 23, 29; EX 5, p. 53-54). After each injection, Dr. Waring stated that Claimant reported 40% to 75% relief in pain. (EX 12, p. 23). Thus, Dr. Waring concluded that Claimant experienced meaningful relief at varying times. (*Id.*). Dr. Waring also had an appointment with Claimant on July 18, 2005. (EX 12, p. 38).

At Claimant's July 18, 2005 appointment with Dr. Waring, Dr. Waring testified that Claimant's pain was better and that Claimant had reduced his use of narcotic medications to one (1) or two (2) tablets a day. (EX 12, p. 30). Additionally, Dr. Waring testified that Claimant was sleeping better with the use of an anti-convulsant medication known as Zonegran which Dr. Waring had previously prescribed for Claimant. (*Id.*; EX 12, p. 34). A side effect of Zonegran is sleepiness which Dr. Waring stated was a good side effect since a patient can take Zonegran at night to help him sleep. (EX 12, p. 36). Dr. Waring further testified that on July 18, 2005 Claimant complained of non-specific neck pain. (*Id.*). Consequently, Dr. Waring ordered a MRI of Claimant's neck. (*Id.*). Dr. Waring also prescribed Zanaflex, a muscle relaxant, for Claimant. (EX 12, p. 34). Side effects of Zanaflex include sleepiness but, according to Dr. Waring, the sedating effect generally lessens with use especially if taken without food on an empty stomach. (EX 12, p. 35).

Dr. Waring reviewed the labor market survey report prepared by Ms. Moffett-Douglas on August 16, 2005. (EX 12, p. 26). When asked specifically about the positions Ms. Moffett-Douglas listed as appropriate for Claimant and available as of April 7, 2004, Dr. Waring testified that all of the positions listed appeared to be sedentary in nature and that from a pain management perspective appeared to be acceptable jobs for Claimant to perform. (EX 12, p. 27-28). Dr. Waring reviewed the positions listed in Ms. Moffett-Douglas' August 11, 2005 labor market survey report as available August 8, 2005 and determined that all of the listed positions would be appropriate jobs for Claimant to perform, but Dr. Waring cautioned that he would defer to the opinion of Dr. Billings. (EX 12, p. 31). Dr. Waring expressed no opinion as to Claimant's ability to drive. (EX 12, p. 32). However, Dr. Waring did express concern regarding Claimant's ability to drive due to Claimant's use of Vicodin. (*Id.*).

E. Deposition Testimony of Dr. John P. Sweeney

Dr. Sweeney initially examined Claimant on February 11, 2004. (EX 13, p. 6). Dr. Sweeney examined Claimant at the request of Ms. Verdone with FARA Healthcare Management for the purposes of preparing a second medical opinion. (EX 13, p. 7). In preparing his second medical opinion, Dr. Sweeney relied on his examination of Claimant, medical records from Dr. Billings, medical records from Dr. Waring, a review of a MRI scan of Claimant's lumbar spine from September 18, 2002 and April 21, 2003, and review of a post-myleogram CT scan as well as a lumbar myleogram of Claimant. (EX 13, p. 7-8; 14). Dr. Sweeney testified that Claimant presented himself complaining of pain in his lower back, posterior buttocks and thighs. (EX 13, p. 9). Dr. Sweeney stated that Claimant told him that his back pain was a result of a work related injury that occurred on September 10, 2002. (*Id.*). Dr. Sweeney could not recall whether Claimant informed him of his involvement in a motor vehicle accident. (EX 13, p. 10-11). Dr. Sweeney testified that Claimant's involvement in a motor vehicle accident might have had a significant impact on his medical opinion if any of Claimant's complaints of pain related to any areas of his person affected by the accident. (EX 13, p. 11).

Dr. Sweeney testified that Claimant reported that his pain was an aching pain with numbness and a stabbing pain from his neck down to the back of his knees and down both arms to the elbow. (EX 13, p. 9). Claimant further reported that his pain was worse on his right side, that he was in pain all the time, that he could not distract himself from the pain, and that he was only able to walk for ten minutes before the pain became too bad. (EX 13, p. 9-10). Dr. Sweeney stated that Claimant informed him that any activity made his pain worse but that his medications seemed to relieve the pain. (EX 13, p. 10).

According to Dr. Sweeney, his physical examination of Claimant indicated that Claimant had a full range of motion of his cervical spine, a full range of motion of his shoulders, elbows, wrists and hands with good grip strength and no numbness. (EX 13, p. 12). However, Claimant's lumbar spine had forward flexion to only 45 degrees, extension to ten degrees, and right and left flexion limited to 10 and 5 degrees respectively. (*Id.*). Dr. Sweeney stated his exam of Claimant essentially revealed that Claimant had limited motion in his back and diffuse tenderness around his lumbar spine. (*Id.*). Dr. Sweeney noted that Claimant had Lidoderm pain patches on his lower neck and back. (*Id.*). Dr. Sweeney also noted that Claimant's station and gait were normal and that Claimant was not using a cane or a brace. (EX 13, p. 13).

Based on his examination of Claimant and his review of Claimant's medical records, Dr. Sweeney opined that Claimant suffered from longstanding degenerative disc disease and hypertrophic arthropathy. (EX 13, p. 14). Dr. Sweeney concluded that Claimant suffered from spondylosis with stenosis stating further that spondylosis is usually degenerative in nature and that stenosis is secondary to the degenerative condition and that Claimant's condition was likely not the result of a single work-related event. (EX 13, 15-17). In addition, Dr. Sweeney testified that, in his opinion, Claimant suffered from a lumbar strain on September 10, 2002. (EX 13, p. 16). Dr Sweeney recommended that Claimant work in a light or sedentary capacity that does not require prolonged standing, repetitive bending or lifting more than thirty-five (35) pounds. (EX 13, p. 18). Dr. Sweeney testified that Claimant should be able to work a 40 hour five (5) day work week in a light to sedentary capacity and could also drive for short distances perhaps even in a capacity as a delivery driver or taxi driver. (EX 13, p. 19).

According to Dr. Sweeney, he next met with Claimant on November 29, 2005 for the purposes of performing an independent medical examination. (EX 13, p. 21). In preparing for this examination, Dr. Sweeney reviewed Claimant's deposition transcript and medical records from Carrier, Dr. Billings,

and Dr. Waring. (EX 13, p. 21-22). Dr. Sweeney testified that Claimant reported essentially the same information as he had during his February 11, 2004 exam, except that Claimant now reported that his ankles were weaker and that he had received about five epidural steroid injections. (EX 13, p. 22). Dr. Sweeney stated that Claimant informed him that the epidural steroid injections were helping to improve his condition. (*Id.*). Claimant also informed Dr. Sweeney that he knew that surgery was an option but that he did not want to pursue surgery as his wife had three surgeries yet is completely disabled and unimproved from surgeries. (EX 13, p. 23). Dr. Sweeney further stated that Claimant informed him that he had a brother who had three back surgeries with no improvement. (*Id.*).

During his examination of Claimant on November 29, 2005, Dr. Sweeney testified that Claimant reported that his neck began hurting after his accident at work and that recently his hands began to go to sleep and he had to shake his hands in order to revive them. (EX 13, p. 23). Claimant reported that his middle and ring fingers go almost completely numb. (*Id.*). Following his examination of Claimant, Dr. Sweeney concluded that Claimant might be suffering from carpal tunnel syndrome since he had Tinel's sign equivocal in both wrists which is an indicator of carpal tunnel syndrome, and since Claimant had positive Phalen's tests which are tests for the syndrome. (EX 13, p. 24). According to Dr. Sweeney, the results of his physical examination of Claimant indicated that Claimant showed diminished reflexes but no numbness in his lower extremities. (EX 13, p. 25). Dr. Sweeney concluded that Claimant suffered from lumbar spondylosis. (EX 13, p. 26). Nevertheless, Dr. Sweeney agreed with Dr. Billings' opinion that Claimant's back injury on September 10, 2002 aggravated the pre-existing degenerative disc disease. (EX 13, p. 37).

In addition, Dr. Sweeney testified that he did not feel Claimant was a candidate for surgery and that the epidural steroid injections seemed to improve Claimant's condition. (EX 13, p. 27). Dr. Sweeney testified that in his opinion, Claimant's condition was relatively static and not likely to improve. (*Id.*). Consequently, Dr. Sweeney recommended that Claimant's work restrictions be considered permanent. (*Id.*). Therefore, Dr. Sweeney testified that, in his opinion, Claimant could work in a sedentary to light capacity and could operate a motor vehicle for short distances. (EX 13, p. 28-29). Dr. Sweeney further testified that Claimant had carpal tunnel syndrome as well as an advanced degenerative cervical disc disease. (EX 13, p. 29). Dr. Sweeney stated that he believed occasional epidural steroid injections would be a reasonable form of pain management for Claimant, but that the issue of too much steroid might need to be considered due to diminishing return. (EX 13, p. 29-30).

Dr. Sweeney testified that he found Claimant's subjective complaints of pain to be out of proportion to his objective findings of advanced degenerative spinal stenosis and spine disease. (EX 13, p. 30). Dr. Sweeney further testified that it was his opinion that Claimant had reached MMI before he initially saw Claimant in February of 2004. (EX 13, p. 31). Dr. Sweeney reviewed the labor market survey report prepared by Ms. Moffett-Douglas on August 16, 2005. (EX 13, p. 32). Dr. Sweeney testified that all of the positions listed in the report were within Claimant's capabilities to perform. (EX 13, p. 32-33). Dr. Sweeney also reviewed the labor market survey report prepared by Ms. Moffett-Douglas on August 11, 2005. (EX 13, p. 33). Dr. Sweeney again found all of the positions listed to be within Claimant's capabilities to perform. (EX 13, p. 33-34).

F. Claimant's Testimony

Claimant is a 59 year old male born on May 12, 1946. (Tr. 12). Claimant hears with assistance of hearing aids. (*Id.*). Claimant began his employment with Employer in 1969 as a tacker and eventually worked as an electrical layout fitter. (Tr. 13-14). Claimant described the duties of an

electrical layout fitter as being responsible for installing electrical foundations, which requires lifting of some heavy items including ten foot pieces of channel, foundations, and plates. (Tr. 14). It was in his position as an electrical layout fitter for Employer that Claimant was injured on September 10, 2002. (Tr. 15).

On September 10, 2002, Claimant and a coworker arrived at a job site to perform work on a ship. (Tr. 15; EX 10, p. 20). Claimant climbed a ladder to access the work site on the ship and lowered a rope to his coworker so that his coworker could attach his tool bucket to the rope, permitting Claimant to hoist the bucket onto the ship. (*Id.*). Claimant then repeated the process so that he could hoist a portable welding machine onto the ship. (Tr. 16; EX 10, p. 20). Once the tools and equipment were aboard the ship, Claimant lifted both the tool bucket and welding machine, intending to carry them to the work site. (Tr. 16; EX 10, p. 20-21). While lifting the tool bucket and welding machine, Claimant immediately felt a pain in his back. (Tr. 16; EX 10, p. 21).

After experiencing pain in his back, Claimant went to Employer's first aid facility. (Tr. 16; EX 10, p. 23). The first aid facility treated Claimant by placing an ice pack on Claimant's back for approximately twenty (20) minutes after which the facility staff told Claimant he could go back to work. (Tr. 16; CX 2, p. 1; EX 10, p. 23). While preparing to leave the facility for work, Claimant was asked how he felt. (Tr. 16; EX 10, p. 23). Claimant informed the facility staff that he felt worse than when he originally came into the facility. (*Id.*). Consequently, the staff ordered some x-rays of Claimant's back. (Tr. 16).

Claimant returned to work for Employer in a light duty position following his accident on September 10, 2002. (Tr. 16-17). After working in Employer's respirator room and small tools shop, Employer informed Claimant that it had no more light duty work for him to perform. (Tr. 17). Claimant last worked for Employer on June 24, 2003. (Tr. 27; EX 10, p. 17, 27). Claimant has not worked since June 24, 2003, his last day of light duty work with Employer. (Tr. 17, 27; EX 10, p. 17, 27).

Claimant's treating physician is Dr. Billings. (Tr. 17). Dr. Billings discussed back surgery with Claimant, but decided Claimant should try epidural steroid injections first. (Tr. 18). Claimant received epidural steroid injections from Dr. Waring. (*Id.*). Besides receiving epidural steroid injections Claimant takes or uses Zanaflex twice a day, Sonogram one (1) to two (2) pills before bed, Mobic increased from once to twice a day, Lidoderm patches, and Bio-Freeze roll-on. (Tr. 18-19). In addition, Dr. Billings substituted Claimant's Vicodin prescription for a Lortab prescription which Claimant takes three (3) times a day. (*Id.*).

Claimant testified that his back injury prevents him from providing much assistance to his wife in terms of work around the house. (Tr. 20). According to Claimant, he helps his wife a little with the dishes and laundry. (*Id.*). Claimant also takes his little dog for walks when he gets the mail, and rolls the garbage cans to the road for pickup. (Tr. 21). Claimant further testified that friends of his from work tend to repairs to his house. (*Id.*). Claimant helps his friends with these repairs by holding nails or a tape or by locating an item of need. (*Id.*).

According to Claimant, any long distance driving is done by his wife. (Tr. 21). Claimant himself drives only short distances like to the corner store. (*Id.*). Claimant testified that he can drive for approximately 15 to 20 minutes before his back pain becomes too severe. (Tr. 21-22). Claimant testified that he applied for various jobs in 2005. (Tr. 22). One job applied for by Claimant was with Foti Finance. (Tr. 22; CX 26, p. 1). Claimant applied for a job with Foti Finance in February of 2005.

(*Id.*). Another job applied for by Claimant was with Barry's Wrecker Service. (*Id.*). Claimant applied for a job with Barry's Wrecker Service in February 2005. (*Id.*). Claimant also applied for a job with Gold Crest Cleaners in March 2005. (*Id.*). Besides applying for these jobs, Claimant testified that he also frequently checks the *Houma Courier* for available jobs. (Tr. 22-23; CX 26, p. 1).

In addition to testifying as to jobs he had applied for, Claimant produced three letters from different prospective employers. (Tr. 23-24). The first letter produced dated July 17, 2003 was from Theriot's Service & Repair Center, Inc. (Tr. 23; CX 27, p. 1). This letter states that the President of the Center, Gregory L. Theriot, did not believe that Claimant could fulfill the duties required of the position and also expressed safety concerns due to Claimant's prescribed medications. (CX 27, p. 1). The second letter produced dated August 31, 2004 was from A-1 Taxi. (Tr. 23; CX 28, p. 1). This letter states that the Manager of A-1, Shiloh Hicks, believed that Claimant was unable to fulfill the requirements of the position of dispatcher due to his inability to sit at a desk for only an hour or so at a time. (CX 28, p. 1). Ms. Hicks also questioned Claimant's ability to concentrate because of all the medications. (*Id.*). The third letter produced dated October 18, 2004 was from Cherise A. Tabor with Houma Terrebonne Housing Authority. (CX 29, p. 1). This letter thanked Claimant for his interest but stated that another more qualified individual had been hired. (Tr. 24; CX 29, p. 1).

According to Claimant, he also applied for a job with Hub Enterprises as a security guard in 2003, with Tracer Protection, with Wal Mart in service repair, and with Vinson Guard Services. (Tr. 24-25). Claimant further testified that he was still under the care of both Dr. Billings and Dr. Waring. (Tr. 25). Claimant stated that at his last appointment with Dr. Billings, Dr. Billings wanted to have another MRI taken of Claimant's neck and back. (Tr. 25-26). Claimant also again stressed his concerns regarding surgery as he said he knows a lot of people who have had surgery and are still in pain. (Tr. 26).

On cross, Claimant confirmed that his direct testimony accurately reflected his efforts to obtain employment in 2005. (Tr. 28). However, Employer's Counsel referred to Claimant's deposition transcript wherein Claimant testified that he had not looked for employment since January 1, 2005.[3] (Tr. 29; EX 10, p. 35-36). Claimant responded that he has a bad memory and has had a bad memory for quite some time. (Tr. 29). Claimant then testified that he applied in person to the jobs he indicated in 2005, but only filled out an application at Gold Crest Cleaners. (Tr. 30-31). Claimant testified that he did not fill out applications at the other places because he was told that there were no job openings. (Tr. 31). Claimant testified further that following his submission of his application to Gold Crest Cleaners, he did not call to check the status of his application. (Tr. 32). Claimant stated that he was told that he would be contacted. (*Id.*). Claimant also stated that he did not call the other locations where he applied in person to see if any of them were then hiring. (Tr. 33).

Claimant reviewed the June 11, 2004 vocational report prepared by Mr. Ordes. (Tr. 34). Claimant testified that he applied for the gate guard with Hub Enterprises position that Mr. Ordes suggested. (Tr. 34-35). Claimant stated that he filled out an application with Hub Enterprises but did not call Hub to check on the status of his application. (Tr. 35). Instead, Claimant went back to Hub in 2005 and asked if any positions had opened. (Tr. 35-36). Claimant further testified that he had not followed up with Houma Terrebonne Housing Authority to see if another position had opened. (Tr. 36).

[3] Claimant testified at a deposition as well as at the hearing. Claimant's deposition transcript was admitted into evidence as part of Employer's exhibits. While I have reviewed Claimant's entire deposition transcript, this portion of Claimant's deposition testimony was the only portion of Claimant's deposition presented at the hearing as being inconsistent with Claimant's direct testimony.

As for A-1 Taxi, Claimant testified that he applied in person, spoke with the person in charge and showed her his medical restrictions. (Tr. 37-38). According to Claimant, after he informed the person in charge at A-1 of his medical restrictions, he was refused employment. (Tr. 38). Claimant stated that he informed the person in charge of his medical restrictions in response to an inquiry regarding any medical problems. (Tr. 38-39). Claimant further testified that he desired to return to some type of work. (Tr. 40).

According to Claimant, the dosage of his prescription for Mobic, in his opinion, was increased by Dr. Billings because of pain he had been experiencing in his legs and ankles. (Tr. 41). Claimant testified that when he drives if his back pain increases, he takes a pain pill upon his return home. (*Id.*). Claimant also uses pain patches to help alleviate the pain. (*Id.*). Claimant agreed that in order to relieve any increased back pain from driving he could pull over and get out of the car and walk around a while. (Tr. 42). Claimant further testified that he uses his prescription medications as directed by both Dr. Billings and Dr. Waring. (Tr. 42-43). Claimant also stated that he receives a bi-weekly check in the amount of $528.80 from F.A. Richard and Associates, third party administrator for Employer. (Tr. 43).

On re-direct, Claimant testified that he did not know if any administration of tests were required for employment with Houma Terrebonne Housing Authority. (Tr. 44). Instead, claimant indicated that the position with the Housing Authority might have required some driving. (Tr. 44).

G. Testimony of Claimant's Wife, Linda Himel

Mrs. Himel and Claimant have been married for 38 years. (Tr. 46). Mrs. Himel usually drives Claimant to his appointments with Dr. Billings and Dr. Waring because of Claimant's back pain. (*Id.*). Mrs. Himel testified that as a passenger as opposed to a driver, Claimant is able to recline his seat to make himself more comfortable. (*Id.*). According to Mrs. Himel, Dr. Billings' office is approximately 60 miles from Claimant's and her home in Houma, Louisiana. (*Id.*). Thus, Mrs. Himel and Claimant must travel approximately 120 miles roundtrip each time Claimant has an appointment with Dr. Billings. (*Id.*).

Mrs. Himel testified that, in her opinion, Claimant's back condition has gotten worse since he last worked for Employer. (Tr. 47-48). Mrs. Himel stated that Claimant used to be able to help around the house more by cleaning and making necessary repairs. (Tr. 48). Since Claimant's last day of work with Employer, Mrs. Himel testified that Claimant is no longer able to make necessary repairs to their house or help with errands or mow the lawn. (*Id.*).

Mrs. Himel testified further that she assists Claimant in taking his medication in a timely manner. (*Id.*). Mrs. Himel also testified that she assists Claimant in his efforts to find employment. (Tr. 49). Besides applying for the positions suggested by the vocational counselors, Mrs. Himel stated that Claimant applied for jobs at places that he heard were looking or to places he found in the newspaper. (Tr. 49-50). Mrs. Himel estimated that in the past two or three years Claimant applied for employment with fourteen (14) to fifteen (15) places. (Tr. 50).

On cross, Mrs. Himel stated that she assists Claimant in taking his medication as prescribed by his doctors. (Tr. 50-51). However, Mrs. Himel indicated that prior to receiving treatment from Dr. Waring, Claimant would take four (4) to five (5) Vicodin pills a day. (Tr. 51). Claimant's prescription instructed Claimant not to take more than three (3) Vicodin pills a day. (*Id.*). Mrs. Himel stated, however, that Claimant's back pain was so bad that he exceeded the recommended dosage, but since

Claimant has been treating with Dr. Waring Claimant has not exceeded the recommended dosage of Vicodin. (*Id.*).

Mrs. Himel testified that the handwritten list submitted by Claimant as CX 26 was written by her because Claimant usually didn't keep track of the jobs for which he applied. (Tr. 52-53). Mrs. Himel testified further that she drove Claimant to each of the locations where he applied for a job, but did not physically accompany him inside the buildings. (Tr. 53). Instead, she waited in the car for Claimant. (*Id.*). Mrs. Himel also testified that she was as certain as she could be that the jobs she listed as applied for by Claimant in 2005 were applied for by Claimant in 2005. (Tr. 53-54). According to Mrs. Himel, she did not always see Claimant fill out an application but testified that she knew he filled out applications because Claimant told her he had. (Tr. 54-55). Although Mrs. Himel did see Claimant complete some applications when Claimant filled out applications at home. (Tr. 55). Mrs. Himel confirmed that Claimant drives occasionally, usually to the corner store or Rouse's which are respectively approximately one (1) and three (3) miles away from the couple's home. (*Id.*).

On further direct examination, Mrs. Himel testified that within the past several weeks she had contacted Tracer and Claimant had contacted Vinson and Wal Mart to inquire again as to any job opportunities for Claimant. (Tr. 90-91). The woman who answered the phone at Tracer told Mrs. Himel that there were no current openings, but to call again in a month or so. (Tr. 91). Mrs. Himel stated that she spoke with the woman at Tracer because Claimant cannot hear on the phone due to distortion caused by his hearing aids. (*Id.*). L.J. with Vinson had Claimant complete an application and said that he would get back in touch with Claimant. (*Id.*). Dora with Wal Mart told Claimant there was no opening for a service writer, but told him to contact her again. (*Id.*).

On further cross examination, Mrs. Himel stated that she did not have any documents with her to substantiate her testimony regarding Claimant's recent job inquiries. (Tr. 92). Rather, Mrs. Himel testified that she and Claimant spoke with representatives from the companies suggested by the vocational counselors. (*Id.*). Mrs. Himel also again stated that Claimant applied for a job at the companies suggested by the vocational counselors, at companies that he had heard were hiring, and at companies that he had found in the newspaper advertising for help wanted. (*Id.*). Mrs. Himel stated that as far as she and Claimant knew all of the jobs to which claimant applied were hiring even though some of the companies told Claimant there were no current openings. (Tr. 93). Mrs. Himel testified that some companies like Foti Finance told claimant they would contact him and that Claimant would sometimes but not always contact the companies again to check the status of his application. (*Id.*).

Mrs. Himel testified that she wants Claimant to return to some type of work suitable to his physical condition and that she encourages Claimant to look for work. (Tr. 93-95). Mrs. Himel testified further that Claimant does not apply for a job every day because some days he is in more pain than others and because he sleeps a lot. (Tr. 94). Mrs. Himel confirmed that Claimant has not worked since his last day of work with Employer. (*Id.*). Mrs. Himel stated that Claimant looks in the newspaper to see if there are any jobs that fit within his physical restrictions. (*Id.*). Mrs. Himel also stated that Claimant talks with friends and neighbors to see if any of them know of any job openings. (Tr. 95). Claimant also met with a man at the local Job Service. (*Id.*). Mrs. Himel further stated that Claimant would look into the positions suggested by vocational expert, Michael Nebe at the hearing. (Tr. 94-95).

Mrs. Himel testified that Claimant's medication, namely his Vicodin and Zanaflex, cause Claimant to be drowsy. (Tr. 96). Mrs. Himel testified further that Claimant usually goes to bed around 7:00 or 8:00 p.m. although he does stay up to 10:00 p.m. at times and wakes up around 7:00 or 8:00 a.m.

(*Id.*). According to Mrs. Himel, Claimant also takes two (2) one (1) hour naps during the day. (Tr. 96-97). Mrs. Himel stated that she is not a medical expert, but is familiar with the effects of Vicodin as she had to take Vicodin herself following back surgery. (Tr. 98-99). Mrs. Himel also stated the she has personally observed the effects Claimant's medication has had on him. (Tr. 99). According to Mrs. Himel, Claimant did not tell Dr. Billings that Vicodin makes him drowsy. (*Id.*). Dr. Billings has, however, since substituted a Lortab prescription for Claimant's Vicodin prescription.

H. Testimony of Vocational Expert, Michael Nebe

Mr. Nebe is a licensed rehabilitation counselor in the state of Louisiana. (Tr. 56). Mr. Nebe has been a licensed rehabilitation counselor since 1993. (*Id.*). Mr. Nebe reviewed the vocational reports prepared by Mr. Ordes and Ms. Moffett-Douglas. (Tr. 58). Mr. Nebe also reviewed deposition transcripts from the depositions of Claimant, Dr. Billings, Dr. Waring, and Dr. Sweeney. (*Id.*). Mr. Nebe stated that the report prepared by Mr. Ordes complied with the requirements of a vocational expert in the state of Louisiana and contained all information necessary to a vocational report. (Tr. 61). Mr. Nebe did not contact any of the employers listed in Mr. Ordes report to check on job availability. (Tr. 63-64).

Mr. Nebe testified that the reports prepared by Ms. Moffett-Douglas on August 11 and August 16, 2005 also complied with the requirements of a vocational counselor in the state of Louisiana. (Tr. 64). Mr. Nebe testified further that the only verification that the positions listed in Ms. Moffett-Douglas' reports were available was the verification of same by Ms. Moffett-Douglas in her reports. (Tr. 65-66). According to Mr. Nebe, all of the positions listed in the reports prepared by Mr. Ordes and Ms. Moffett-Douglas were jobs within Claimant's physical restrictions and commensurate with his educational background and work history. (Tr. 66-67). In Mr. Nebe's opinion, Claimant could have a reasonable expectation of being hired at all of the positions listed in Mr. Ordes and Ms. Moffett-Douglas' reports. (Tr. 67).

Besides reviewing the reports prepared by Mr. Ordes and Ms. Moffett-Douglas, Mr. Nebe also researched job availability in the Houma area himself. (Tr. 67). Mr. Nebe testified that he found several jobs that he believed were suitable for Claimant and that Claimant could have a reasonable expectation of being hired. (*Id.*). Mr. Nebe located these jobs by searching the internet, contacting the local Job Service, and making some phone calls. (Tr. 67-68). Mr. Nebe determined the suitability and availability of the jobs on the Friday and Monday immediately preceding the hearing. (Tr. 68).

Following are the positions Mr. Nebe identified as suitable employment for Claimant:

Employer	Position
M&L Engine 1212 St. Charles St. Houma, Louisiana	sales person lifting 20 to 30 pounds, $8.00 per hour, full time
Tracer Security 1541 Grand Caillou Houma, Louisiana	cashier/security guard light duty, $6.50 per hour, full time

Books-A-Million Houma, Louisiana	book seller no heavy lifting, $5.50 per hour, full time
Vinson Guard Service 1463 St. Charles St. Houma, Louisiana	unarmed security guard sedentary to light, $6.00 per hour, part time

(Tr. 68-73). Mr. Nebe testified that he spoke with Aaron in the parts department at M&L Engine. (Tr. 68). According to Mr. Nebe, Aaron indicated that M&L was looking for a sales person to look up parts in books, assists customers, process orders, and run some inventory. (*Id.*). Mr. Nebe testified that the position did not require any experience and that M&L was willing to train. (*Id.*). Aaron informed Mr. Nebe that the position required a lifting ability to a twenty (20) to thirty (30) pound range and that if anything heavier needed to be lifted, someone else could help. (*Id.*). The position also permitted sitting and standing interchangeably although any sitting would have to be during a break between customers. (Tr. 69).

Mr. Nebe testified that Tracer Security told him that their position required monitoring the area for illegal activity as well as working as a cashier. (Tr. 70). According to Mr. Nebe, the position with Tracer required walking and standing although one could sit during breaks between customers. (*Id.*). Mr. Nebe spoke with the Manager of Books-A-Million who told him that Claimant would need to apply online to be considered for employment. (Tr. 71). Mr. Nebe suggested that if Claimant does not have access to a computer that he might try the store to see if he could apply online there or try a public library. (Tr. 72). According to Mr. Nebe, the position with Books-A-Million was more flexible as to alternating between sitting and standing because employees alternate positions. (Tr. 71). Thus, an employee could go from performing the duties of a cashier to restocking or straightening books. (*Id.*). Mr. Nebe indicated that this position did not require any heavy lifting, but he assumed that if heavy lifting were required, an employee could ask another employee for assistance. (Tr. 71-72).

According to Mr. Nebe, he spoke with L.J. at Vinson Guard who told Mr. Nebe that the unarmed security guard position was a part time 24 hour weekend position and that no experience was required. (Tr. 72-73). In Mr. Nebe's opinion, all of the positions he located were suitable for Claimant considering his physical restrictions, educational background and medical history. (Tr. 74-75). Mr. Nebe indicated that each position was within two (2) to eight (8) miles away from Claimant's residence. (Tr. 74.). Mr. Nebe testified that he was willing to assist Claimant in applying for these positions should Claimant have any difficulty doing so himself and was even willing to help Claimant compose a resume. (Tr. 75). Mr. Nebe indicated that he had a problem with the manner in which Claimant presents himself to prospective employers. (*Id.*). According to Mr. Nebe, Claimant should not tell any employer about his physical restrictions until he is offered a job. (*Id.*). Mr. Nebe stated that such disclosure is not required under the ADA until a job is offered. (*Id.*).

On cross, Mr. Nebe indicated that he was familiar with lifting restrictions assigned to Claimant by Dr. Billings as ten (10) to twenty (20) pounds occasionally or, sedentary to light duty. (Tr. 76). Mr. Nebe testified that the position with M&L Engine would be categorized as light duty or a little above light duty. (*Id.*). Mr. Nebe reviewed the August 12, 2005 vocational report prepared by Ms. Moffett-Douglas. (Tr. 77). Mr. Nebe acknowledged that in that report Ms. Moffett-Douglas indicated that there were no available positions with Hub Enterprises, that Claimant had registered for job placement with Job Service on August 21, 2004, and that the interviewer at Job Service said that Claimant had been

making a concentrated job search effort. (*Id.*). Mr. Nebe indicated that he understood that Dr. Billings was concerned with the cake decorator position that Ms. Moffett-Douglas had suggested. (*Id.*). Mr. Nebe acknowledged further that he had not contacted either Mr. Ordes or Ms. Moffett-Douglas regarding Claimant. (Tr. 78-79). Mr. Nebe stated that he did not know why either of them had not offered to assist Claimant in his effort to obtain employment. (*Id.*). Although Mr. Nebe indicated that perhaps by meeting with Claimant Mr. Ordes had assisted Claimant to a degree. (Tr. 79-80).

On redirect, Mr. Nebe testified that if Claimant were to get the job with M&L Engine and he had to lift an item heavier than twenty (20) pounds, he could ask for assistance. (Tr. 80). In determining Claimant's physical restrictions, Mr. Nebe looked to the opinions of Dr. Sweeney, Dr. Waring, and Dr. Billings. (*Id.*). According to Mr. Nebe, Dr. Sweeney indicated that Claimant could lift up to thirty-five (35) pounds. (*Id.*). Dr. Sweeney was not Claimant's treating physician, but had offered a second opinion as to Claimant's physical condition. (Tr. 81). Dr. Waring indicated that Claimant could perform sedentary to light activities. (Tr. 80). Dr. Waring was Claimant's pain management physician. (Tr. 81). Dr. Billings indicated that Claimant could perform sedentary to light duty activities. (Tr. 80-81). Dr. Billings is Claimant's treating physician. (Tr. 81). Mr. Nebe testified that he understood light duty to include lifting up to twenty (20) pounds occasionally. (*Id.*). Mr. Nebe testified further that neither he nor the other vocational counselors provided any of Claimant's physicians with a list of recommended positions for the physician's approval. (Tr. 82).

Mr. Nebe indicated that the position with Tracer would have to be categorized as light duty because the position required that employees mostly stand. (Tr. 83-84). Mr. Nebe acknowledged that among Claimant's restrictions was no prolonged standing or sitting. (Tr. 84). Mr. Nebe acknowledged that Claimant appeared to have been applying for positions that fit within his physical restrictions and that were similar if not the same positions each of the vocational counselors had suggested. (Tr. 84-85). Mr. Nebe indicated that he did not doubt Claimant's sincerity in trying to obtain employment; rather, he doubted Claimant's diligence in trying to obtain employment. (Tr. 85). According to Mr. Nebe, Claimant needed to apply to more than three or four jobs a year and needed to do more than simply go into a business and ask if there was an opening. (*Id.*).

On recross, Mr. Nebe testified that he did not know whether the Vinson Guard part time weekend position required two twelve hour work days or three eight hour work days. (Tr. 86). Mr. Nebe indicated that if the position required two twelve hour work days the position might not be suitable for Claimant. (*Id.*). On redirect, Mr. Nebe testified that Dr. Billings, Dr. Waring and Dr. Sweeney had each reviewed the vocational reports prepared by Mr. Ordes and Ms. Moffett-Douglas. (Tr. 87). Mr. Nebe testified further that each of these physicians had approved the listed positions with the exception of the cake decorator position. According to Mr. Nebe, none of Claimant's medications should affect his ability to work. (Tr. 88). Mr. Nebe stated that each of the positions he suggested fit within the 45 minute driving restriction placed on Claimant by Dr. Billings. (Tr. 88-89).

IV. DISCUSSION

A. Argument of Parties

Claimant contends that he is permanently and totally disabled as a result of his work related injury on September 10, 2002 and is entitled to full benefits retroactive to June 23, 2004 when his benefits were reduced. Claimant further contends that he has met his burden of establishing a *prima facie* case of total disability and that Employer has not met its burden of establishing suitable alternative

employment, citing ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F. 2d 1031 (5th Cir. 1981). Claimant asserts that Dr. Billings' approval of the majority of the positions presented by Employer's vocational rehabilitation counselors should be viewed cautiously in light of testimony provided by Claimant regarding side effects of Claimant's medications. Claimant testified that Vicodin causes him to be drowsy. Claimant acknowledged that he did not tell Dr. Billings about the effect Vicodin had on him, but asserts that if Dr. Billings were so aware he would not have approved any of the positions presented by Employer's vocational rehabilitation counselors.

Nevertheless, Claimant argues that should Employer be found to have met its burden under *Turner* of establishing suitable alternative employment, Claimant is still totally disabled as he has met his burden of establishing reasonable diligence, citing ***Rogers Terminal & Shipping Corporation v. Director***, 784 F. 2d 687 (5th Cir. 1986). Claimant asserts that he has met his burden under *Rogers Terminal* of establishing reasonable diligence in looking for a job. Claimant states that he has personally applied for jobs, periodically checks the *Houma Courier* for available jobs, and has been rejected from employment with several companies. Therefore, Claimant contends that under *Rogers Terminal* he is to be considered totally disabled. In addition, Claimant contends that if he is found to have an earning capacity his earning capacity should be $227.29 per week since wages earned in a post injury job are to be adjusted to represent the wages which the job paid at the time of Claimant's injury, citing ***Richardson v. General Dynamics Corporation***, 19 BRBS 48 (1986); ***Bethard v. Sun Shipbuilding & Dry Dock Company***, 12 BRBS 691 (1980).

Employer argues that (1) it has demonstrated suitable alternative employment for Claimant; (2) Claimant has failed to demonstrate reasonable diligence in attempting to secure employment, thereby precluding a finding of permanent and total disability; and (3) that Claimant's use of prescription medications and his back pain does not impair Claimant's ability to obtain suitable alternative employment or his ability to drive. Employer contends that is has established suitable alternative employment for Claimant, citing ***New Orleans (Gulfwide) stevedores v. Turner***, 661 F. 2d 1031 (5th Cir. 1981). Employer contends that in order to establish suitable alternative employment, it need only show availability of one suitable job, citing ***P&M Crane Company v. Hayes***, 930 F. 2d 424 (5th Cir. 1981). Employer further contends that it need not introduce specific evidence of a particular job opening, but rather need only show "availability of general job openings in certain fields in the surrounding community", quoting ***Avondale Shipyards, Inc. v. Guidry***, 967 F. 2d 1039 (5th Cir. 1992). Employer argues that it has met its burden under *Turner* by showing suitable alternative employment through labor market surveys, evaluations and testimony of Mr. Nebe.

Employer asserts that having satisfied its burden of establishing suitable alternative employment, Claimant must show reasonable diligence on his part to secure employment, citing ***Rogers Terminal & Shipping Corporation v. Director***, 784 F. 2d 687 (5th Cir. 1986). Employer contends that Claimant has not satisfied this burden. Employer states that Claimant spontaneously applied for jobs without knowing if the employers were hiring or not, Claimant did not follow-up on any of his applications, Claimant did not produce any corroborative evidence regarding his applications for employment, and that Claimant did not do all that he could do to secure employment. Employer argues that under ***Kennedy Ladner v. Avondale Industries***, 2004 LHC 693 (ALJ 1/05), Claimant's reported job search efforts are simply insufficient to establish reasonable diligence. Therefore, Employer contends that Claimant is precluded from a finding of permanent and total disability. In addition, Employer argues that the physicians who have examined Claimant have found that Claimant can drive for a limited period of time and that Claimant never reported any drowsiness to his treating physician. Thus, Employer asserts that neither

Claimants back nor his medications should prevent Claimant from securing suitable alternative employment or from driving.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. ***Banks v. Chicago Grain Trimmers Association, Inc.***, 390 U.S. 459, 467 (1968); ***Louisiana Insurance Guaranty Ass'n v. Bunol***, 211 F.3d 294, 297 (5th Cir. 2000); ***Hall v. Consolidated Employment Systems, Inc.***, 139 F.3d 1025, 1032 (5th Cir. 1998); ***Atlantic Marine, Inc. v. Bruce***, 551 F.2d 898, 900 (5th Cir. 1981); ***Arnold v. Nabors Offshore Drilling, Inc.***, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. ***Banks v. Chicago Grain Trimmers Association, Inc.***, 390 U.S. at 467; ***Mijangos v. Avonldale Shipyards, Inc.***, 948 F.2d 941, 945 (5th Cir. 1991); ***Huff v. Mike Fink Restaurant, Benson's Inc.***, 33 BRBS 179, 183 (1999).

Here, based on the record as a whole and my observations of the witnesses, I am convinced that Claimant is a sincere and honest witness who has demonstrated an extraordinary desire to work. Indeed Claimant's local Job Service even commented favorably about Claimant's tenacity. (Tr. 77). Overall, I was very impressed by Claimant's and Mrs. Himel's sincerity and testimony. On the other hand, I was not impressed by Mr. Nebe's testimony concerning allegedly suitable alternative employment which failed to consider all of Claimant's physical restrictions, including the postural limitations specified by Dr. Billings, and in some cases recommended positions which were clearly inappropriate.

C. Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 ***U.S.C.*** §920(a). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. ***Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter***, 227 F.3d 285, 287 (5th Cir. 2000); ***O'Kelly v. Department of the Army***, 34 BRBS 39, 40 (2000); ***Kier v. Bethlehem Steel Corp.***, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter***, 227 F.3d *at 287*. However, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. ***U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP***, 455 U.S. 608 (1982). *See also,* ***Bludworth Shipyard Inc., v. Lira***, 700 F.2d 1046, 1049 (5th Cir. 1983); ***Devine v. Atlantic Container Lines***, 25 BRBS 15, 19 (1990).

To show harm or injury a claimant must show that something has gone wrong with the human frame. ***Crawford v. Director, OWCP***, 932 F.2d 152, 154 (2nd Cir. 1991); ***Wheatley v. Adler***, 407 F.2d 307, 311-12 (D.C.Cir. 1968); ***Southern Stevedoring Corp. v. Henderson***, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode. ***Adkins v. Safeway Stores, Inc.***, 6 BRBS 513, 517 (1978). Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant

must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" ***Wheatley v. Adler***, 407 F.2d at 313. A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. ***Hampton v. Bethlehem Steel Corp.***, 24 BRBS 141, 144 (1990); ***Golden v. Eller & Co.***, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. ***Bonin v. Thames Valley Steel Corp.***, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence a condition existed at work which could have cause his depression); ***Alley v. Julius Garfinckel & Co.***, 3 BRBS 212, 214-15 (1976); ***Smith v. Cooper Stevedoring Co.***, 17 BRBS 721, 727 (1985) (ALJ).

To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work related accident or that the work related accident did not aggravate claimant's underlying condition. ***Port Copper/T. Smith Stevedoring Co. v. Hunter***, 227 F. 3d at 287; ***Gooden v. Director, OWCP***, 135 F. 3d 1066, 1068 (5th Cir. 1998). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. ***Gooden v. Director, OWCP***, 135 F.3d at 1069 (5th Cir. 1998); ***Kubin v. Pro-Football, Inc.***, 29 BRBS 117, 119 (1995). Here, there is no dispute and I find that Claimant suffered a workplace accident in the course and scope of his employment on September 10, 2002. There is also no dispute and I also find that Claimant was injured as a result of his workplace accident and that Claimant is receiving treatment from Dr. Billings and Dr. Waring for his injury.

D. Nature and Extent of Injury and Date of Maximum Medical Improvement

Claimant seeks total and permanent disability and associated medical benefits as a result of his September 10, 2002 workplace accident. Claimant contends that he is permanently and totally disabled as a result of his work related injury on September 10, 2002 and is entitled to full benefits retroactive to June 23, 2004 when his benefits were reduced. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 ***U.S.C.*** §902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. ***Watson v. Gulf Stevedore Corp.***, 400 F.2d 649 (5th Cir. 1968); ***Seidel v. General Dynamics Corp.***, 22 BRBS 403, 407 (1989); ***Stevens v. Lockheed Shipbuilding Co.***, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement ("MMI").

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence**.** ***Hite v. Dresser Guiberson Pumping***, 22 BRBS 87, 91 (1989); ***Care v. Washington Metro Area Transit Authority***, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. ***Lozada v. General Dynamics Corp.***, 903 F.2d 168 (2d Cir. 1990); ***Sinclair v. United Food & Commercial Workers***, 13 BRBS 148 (1989); ***Trask v. Lockheed Shipbuilding & Construction Co.***, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, (***Leech v. Service Engineering Co.***, 15 BRBS 18 (1982)), or if his condition has stabilized. ***Lusby v. Washington Metropolitan Area Transit Authority***, 13 BRBS 446

(1981). In this case the parties stipulated and Dr. Billings confirmed and I find that Claimant reached MMI on March 10, 2004.

a. *Prima Facie* Case – Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. However, case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d at 1038; ***P&M Crane Co. v. Hayes***, 930 F.2d at 429-30; ***SGS Control Serv. v. Director, OWCP***, 86 F.3d 438, 444 (5th Cir. 1996). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. ***Elliot v. C&P Telephone Co.***, 16 BRBS 89 (1984) (emphasis added). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. ***Walker v. Sun Shipbuilding & Dry Dock Co.***, 19 BRBS 171 (1986).

In this case the record is clear that Claimant cannot perform his past work as an electrical layout fitter. Dr. Billings and Dr. Sweeney each concluded that Claimant suffered from spondylosis with stenosis and a lumbar strain. (EX 11, p. 12-13; EX 13, p. 15-17). Both of these physicians agreed that Claimant could work, but not without restrictions. (EX 11, p. 38-42; EX 13, p. 18). Claimant's work restrictions as specified by his treating physician, Dr. Billings, include no stooping, squatting, heavy lifting, kneeling, bending at the waist, prolonged standing, and alternate standing and sitting to one (1) hour at a time and limited driving. (CX 2, p. 7-9; EX 11, p. 30, 38-42; EX 13, p. 16). I have no cause to doubt the credibility of Dr. Billings, nor do I have any cause to doubt the earnestness of his prognosis and treatment of Claimant. Therefore, I find these restrictions equivalent to a residual functional capacity. Accordingly, Claimant has a residual functional capacity of no stooping, squatting, heavy lifting, kneeling, bending at the waist, prolonged standing, and alternate standing and sitting to one (1) hour at a time and limited driving.

Claimant described the duties of an electrical layout fitter as being responsible for installing electrical foundations, which requires heavy lifting of such items as ten (10) foot pieces of channel as well as lifting of foundations and plates. (Tr. 14). It is clear that considering the medical evaluations of Dr. Billings and Dr. Sweeney, Claimant's residual functional capacity, and Claimant's past job duties, that Claimant cannot perform his past work as an electrical layout fitter. Therefore, I find that Claimant has established a *prima facie* case of permanent and total disability.

b. Suitable Alternative Employment

Once a *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d at 1038; ***P&M Crane Co. v. Hayes***, 930 F.2d at 430; ***Clophus v. Amoco Prod. Co.***, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. ***SGS Control Serv. v. Director, OWCP***., 86 F.3d at 444; ***Palombo v. Director, OWCP***, 937 F.2d 70, 73 (D.C. Cir. 1991); ***Rinaldi v. General Dynamics Corp.***, 25 BRBS 128, 131 (1991). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. ***New Port News Shipbuilding & Dry Dock Co.***, 841 F.2d 540, 542-43 (4th Cir. 1988); ***Bryant v. Carolina Shipping Co., Inc.***, 25 BRBS 294, 296 (1992).

The Fifth Circuit has established a two-part inquiry to assist employers in satisfying their burden as to establishing available suitable alternative employment. The first inquiry states, "[c]onsidering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?" ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d at 1042-1043 (footnotes omitted). The second inquiry requires a determination as to "[w]ithin this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure?" ***Id.***

Should an employer show reasonably attainable and available employment opportunities, the burden shifts to claimant to establish reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer. ***Id.*** A claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. ***Ceres Marine Terminal v. Hinton***, 243 F.3d 222 (5th Cir. 2001); ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d at 1040. A diligent job search "involves an industrious, assiduous effort to find a job by one who conveys an impression to potential employers that he really wants to work." ***Livingston v. Jacksonville Shipyards, Inc.***, 33 BRBS 524, 526 (ALJ) (July 7, 1999). The claimant need not prove that he was turned down for the exact jobs that the employer showed as available, but must demonstrate diligence in attempting to secure a job within the compass of opportunities that the employer reasonably showed as available. ***Palombo v. Director, OWCP***, 937 F.2d at 74.

Here, Employer attempted to show suitable alternative employment through vocational reports prepared by Mr. Ordes and Ms. Moffett-Douglas as well as through testimony of vocational rehabilitation expert Mr. Nebe. Each of the physicians who examined Claimant recommended Claimant restrict any work activities to sedentary to light duty. (EX 11, p. 38-42; EX 12, p. 27-28; EX 13, p. 18). Claimant's treating physician, Dr. Billings, restricted Claimant's work activities to no stooping, squatting, heavy lifting, kneeling, bending at the waist, prolonged standing, and to alternate standing and sitting to one (1) hour at a time and limited driving. (CX 2, p. 7-9; EX 11, p. 30, 38-42; EX 13, p. 16). Dr. Sweeney, who provided a second medical opinion as well as an independent medical exam, restricted Claimant's activities to no lifting over thirty-five (35) pounds. (EX 13, p. 18). In order to establish suitable alternative employment, Employer must first show that Mr. Ordes, Ms. Moffett-Douglas and Mr.Nebe considered Claimant's work restrictions, age and background, in determining what type of jobs Claimant is capable of performing or being trained to perform and further that within that type of jobs that there are jobs reasonably available for which Claimant could realistically and likely secure. ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d at 1042-1043.

The vocational assessment report prepared by Mr. Ordes noted physical limitations reported by Claimant as including lifting, hearing, sitting, walking, standing for long periods, reaching, and numbness in his foot on occasion, bending, kneeling, and sleeping. (EX 14, p. 11). The positions identified by Mr. Ordes as suitable for Claimant and available as of the date of MMI were gate guard with Hub Enterprises and cake decorator. (EX 14, p. 13). The positions identified by Mr. Ordes as suitable for Claimant and available as of the week of June 7-12, 2004 were security guard from a Job Service listing, housing counselor 1 with Houma Terrebonne Housing Authority, and dispatcher with A-1 Taxi. (EX 14, p. 13, 15-16). Claimant's treating physician did not believe the cake decorator position was suitable employment for Claimant. (Tr. 36; EX 11, 48-50).

In addition, while Mr. Ordes indicated in his report that he considered Claimant's age, history and background in determining suitable employment, such representation appear to be inaccurate. (EX 14, p. 13, 15-16). Mr. Ordes clearly notes the physical limitations reported to him by Claimant. (EX 14, p. 11). Among the limitations listed is hearing impairment. (*Id.*). Although Mr. Ordes noted Claimant's reported limitation, Mr. Ordes made no attempt to determine the extent of Claimant's hearing impairment. It is clear from the record that had Mr. Ordes made even a basic inquiry as to Claimant's hearing impairment he would have discovered that Claimant has difficulty hearing over the telephone due to distortion caused by his hearing aids. (Tr. 91). Had Mr. Ordes truly considered Claimant's background and history, he surely would not have identified a position such as taxi cab dispatcher as suitable employment for Claimant as such position requires an ability to effectively communicate over a telephone. Moreover, Mr. Ordes indicated that he reviewed all Claimant's medical records from Dr. Billings, Dr. Waring, and Dr. Sweeney. (EX 14, p. 10). Yet, Mr. Ordes made no indication that any of the jobs he identified as suitable and available employment for Claimant fit within the postural limitations placed on Claimant by his treating physician, Dr. Billings.

Nevertheless, Claimant applied for the dispatcher job with A-1 Taxi. (Tr. 23). Claimant was refused employment with A-1 Taxi. (Tr. 23; CX 28, p.1). Claimant also applied for the gate guard and the security guard positions. (Tr. 24-25; EX 14, p. 7). Claimant did not follow-up with Hub Enterprises or Job Service regarding the status of his applications. (Tr. 35-37). Instead, Claimant periodically went back in person to Hub to check on availability of the gate guard position. (Tr. 35-36). In addition, the local Job Service told Claimant he would be contacted regarding the security guard position. (Tr. 36-37).

Additionally, Ms. Moffett-Douglas noted in her August 11, 2005 vocational assessment and LMS update that the gate guard position with Hub Enterprises that had been identified by Mr. Ordes was no longer available in the Houma area. (EX 14, p. 7). Ms. Moffett-Douglas also noted that Claimant had registered for the security guard position with Job Services that was identified by Mr. Ordes as suitable and available, but that there were no other job specific details. (*Id.*). Ms. Moffett-Douglas noted further that Claimant had submitted an application for the housing counselor position with Houma Terrebonne Housing Authority but that no other suitable positions were then available. (*Id.*). Following this update, Ms. Moffett-Douglas identified three (3) positions as suitable and available employment for Claimant: unarmed security guard with Vinson Guard Service, auto service writer with Wal Mart, and cashier unarmed guard with Tracer Security. (EX 14, p. 7-8). Like Mr. Ordes, Ms. Moffett-Douglas indicated that she had reviewed all Claimant's relevant medical records from Dr. Billings, Dr. Waring, and Dr. Sweeney. (EX 14, p. 6-7). Also like Mr. Ordes, Ms. Moffett-Douglas made no indication that any of the positions she identified as suitable and available employment for Claimant fit within the postural limitations placed on Claimant by Dr. Billings. Nonetheless, Claimant applied for the positions identified by Ms. Moffett-Douglas as suitable and available employment but was told that no positions were available. (Tr. 24-25).

Besides the unarmed security guard, auto service writer, and cashier unarmed guard, Ms. Moffett-Douglas also identified the following positions as suitable and available employment on April 7, 2004 in her August 16, 2005 labor market survey report: gate guard with American Citadel, dispatcher with A-1 Taxi, and front desk clerk with Red Carpet Inn. (EX 14, p. 18-19). Ms. Moffett-Douglas indicated in this report that she reviewed all Claimant's relevant medical records as well as the vocational assessment report prepared by Mr. Ordes to assist her in determining suitable employment for Claimant. (EX 14, p. 17-18). Mr. Ordes clearly indicated in his report that Claimant reported to him a hearing impairment. (EX 14, p. 11).

Although Ms. Moffett-Douglas indicated that she reviewed Mr. Ordes report to assist her in determining suitable employment for Claimant, had she truly considered Mr. Ordes' report, she surely would not have identified, at least not without a bit of caution, positions such as a taxi cab dispatcher or motel front desk clerk. Obviously such positions require an ability to effectively communicate over a telephone. Certainly a person who reports a hearing impairment would cause some pause on the part of a vocational counselor in suggesting placement of such a person in a position which requires an ability to effectively communicate over a telephone. Moreover, Mr. Ordes indicated that he reviewed all Claimant's medical records from Dr. Billings, Dr. Waring, and Dr. Sweeney. (EX 14, p. 10). Furthermore, Ms. Moffett-Douglas although familiar with Claimant's medical history, made no indication that the gate guard position that she identified as suitable and available employment for Claimant fit within the postural limitations placed on Claimant by Dr. Billings.

Mr. Nebe, not unlike Ms. Moffett-Douglas, never met with or interviewed Claimant. (Tr. 76). Instead, Mr. Nebe relied on written records regarding Claimant, including records prepared by Ms. Moffett-Douglas and Mr. Ordes. (Tr. 58). Although Mr. Nebe reportedly reviewed the records prepared by Mr. Ordes and Ms. Moffett-Douglas, Mr. Nebe suggested Claimant apply for a position with Books-A-Million. (Tr. 71). This required that an applicant possess computer skills in order to even apply. (*Id.*). Neither Mr. Ordes nor Ms. Moffett-Douglas indicated Claimant possessed any degree of computer skills. (*See e.g.*, EX 14). Mr. Nebe likewise did not address Claimant's ability to use a computer or potentiality to acquire computer skills; rather, Mr. Nebe simply asserted, or perhaps assumed, that Claimant could use a computer. (Tr. 71). I find no basis for such an assertion. Without more, I am unable to find Mr. Nebe's suggested position with Books-A-Million as being suitable alternative employment for Claimant. In addition, although Mr. Nebe testified that he reviewed the depositions transcripts of Dr. Billings, Dr. Waring, and Dr. Sweeney, Mr. Nebe made no indication that the position with Books-A-Million fit within the postural limitations placed on Claimant by Dr. Billings. (Tr. 58, 71).

Additionally, Dr. Billings, Dr. Waring, and Dr. Sweeney each concluded that Claimant could work sedentary to light duty. (EX 11, p. 38-42; EX 12, p. 27-28; EX 13, p. 18). Despite these conclusions, Mr. Nebe suggested a position with M&L Engine that he categorized as maybe a little above light duty. (Tr. 76). I find no basis for Mr. Nebe's disregard of the physicians' opinions as to Claimant's work restrictions. Certainly a little above light duty position cannot seriously be entertained as suitable alternative employment for an individual restricted to sedentary to light duty and no stooping, squatting, heavy lifting, kneeling, bending at the waist, prolonged standing, and alternate standing and sitting to one (1) hour at a time.

Moreover, in concluding that the position with M&L was suitable alternative employment for Claimant, Mr. Nebe indicated that he relied on the information provided by both Dr. Billings and Dr. Sweeney as to Claimant's work restrictions. (Tr. 80). Claimant's treating physician, Dr. Billings, restricted Claimant to sedentary to light duty. (Tr. 80-81). Dr. Sweeney restricted Claimant to sedentary to light duty with occasional lifting up to thirty-five (35) pounds. (Tr. 80; EX 13, p.18). Categorizing the M&L position as a little above light duty, clearly places the position outside Claimant's work restrictions as specified by Dr. Billings. As indicated above, I have no cause to doubt the credibility of Dr. Billings, nor do I have any cause to doubt the earnestness of his prognosis and treatment of Claimant. And I accord greater weight to the opinion of Dr. Billings over Dr. Sweeney who saw Claimant only twice, once for a second medical opinion and once more for an independent medical

exam. I find no objective basis for this apparent disregard of Claimant's treating physician's opinion and preference for Dr. Sweeney's opinion.

Mr. Nebe also identified a position with Tracer Security as suitable alternative employment for Claimant. (Tr. 69-70). Mr. Nebe understood Claimant's work restrictions as specified by Dr. Billings, Dr. Waring, and Dr. Sweeney. (Tr. 67). Mr. Nebe knew that among Claimant's work restrictions was alternating standing and sitting to one (1) to two (2) hour intervals at a time. (Tr. 83-84). Nevertheless, Mr. Nebe identified the guard position with Tracer as suitable alternative employment for Claimant even though the position required a great deal of standing. (*Id.*). Clearly Claimant's physical restrictions would prevent him from being able to fulfill the duties required of this position.

In addition, Mr. Nebe identified an unarmed security guard position with Vinson Guard Service which he indicated as suitable alternative employment for Claimant considering Claimant's physical restrictions, medical history, and educational background. (Tr. 74-75). Although Mr. Nebe testified that the position with Vinson Guard Service was suitable alternative employment for Claimant in light of his physical restrictions, Mr. Nebe made no indication that the position with Vinson fit within the postural limitations placed on Claimant by Dr. Billings. Without such information, I am unable to find the position with Vinson Guard Service as suitable alternative employment for Claimant.

Overall I was not impressed by any of the vocational counselor's labor market survey reports or vocational assessments. The counselors identified several positions which they identified as suitable and available employment for Claimant. Yet, none of the counselors addressed the postural limitations placed on Claimant by his treating physician, Dr. Billings. Without addressing whether the physical requirements of the identified positions fit within Claimant's postural limitations, it is impossible to determine the actual suitability of any of the identified positions.

Furthermore, while each of the counselors identified several positions as suitable and available employment for Claimant, Claimant applied for nearly all the identified positions yet was either rejected or never contacted for an interview. In sum, Claimant applied for employment with Hub Enterprises, Houma Terrebonne Housing Authority, A-1 Taxi, Job Service, Vinson Guard Service, Wal Mart, and Tracer Security. Had any of the positions truly been suitable or available employment for Claimant, Claimant should have received a job offer from at least one of the identified employers. While Mr. Nebe testified that Claimant's presentation of his physical restrictions to the identified employers might explain why Claimant was not offered a job, had the counselors been frank in their reported discussions with the employers, Claimant's presentation of his physical limitations should not have inhibited any of the employers from offering Claimant a job. Therefore, I find that Employer has not met its burden of establishing suitable alternative employment as required by *Turner*.

Nevertheless, assuming arguendo that Employer had met its burden under *Turner*, in order to rebut Employer's evidence of suitable alternative employment, Claimant must demonstrate that he diligently searched for a job but was unable to obtain a position. ***Ceres Marine Terminal v. Hinton***, 243 F.3d 222 (5th Cir. 2001); ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d at 1040. Claimant's last day of employment with Employer was June 24, 2003. (Tr. 27; EX 10, p. 17, 27). Since June 24, 2003 Claimant has applied for employment with several companies. In July 2003, Claimant applied for employment with Theriot's Service & Repair Center, Inc. (Tr. 23). Claimant was denied employment with Theriot's because the President of the Center did not believe Claimant could fulfill the duties required of the position. (CX 27, p. 1). The President of the Center also expressed concern regarding Claimant's prescribed medications. (*Id.*). In approximately July of 2003, Claimant applied

for a security guard position with Hub Enterprises. (Tr. 24). Claimant was told that he would be contacted about his application. (*Id.*).

Claimant applied for four (4) of the positions identified by Mr. Ordes as available and suitable employment in his June 11, 2004 vocational assessment report. (Tr. 23-25). As to those positions, Claimant was refused employment with A-1 Taxi as the Manager of A-1 did not believe that Claimant could fulfill the duties of a taxi dispatcher due to his inability to sit at a desk for only an hour or so at a time. (Tr. 23; CX, p.1). The Manager of A-1 also expressed concern regarding Claimant's ability to concentrate because of all his medications. (CX 28, p. 1). Claimant was also refused employment with Houma Terrebonne Housing Authority as a more qualified individual had already been hired. (Tr. 24; CX 29, p. 1). As to the two (2) remaining positions, Claimant applied for both the gate guard and security guard positions. (Tr. 24-25; EX 14, p. 7). Claimant did not follow up with a telephone call to either Hub Enterprises or Job Service regarding the status of his applications. (Tr. 35-37). Instead, Claimant periodically showed up in person to Hub to check on availability of the gate guard position. (Tr. 35-36). In addition, the local Job Service told Claimant that he would be contacted regarding the security guard position. (Tr. 36-37).

Besides applying for the positions identified by Mr. Ordes as available and suitable, Claimant applied for the three (3) jobs identified by Ms. Moffett-Douglas in her August 11, 2005 vocational assessment. (Tr. 24-25). As to these positions, Claimant was told by Tracer that there were no openings, but to check back later. (Tr. 25). Dora with Wal Mart informed Claimant that she had no openings for an auto service writer. (*Id.*). Claimant was also told by Vinson Guard Service that there were no openings, but that some interviews were going to be set up within a few weeks. (*Id.*).

In addition to applying for positions identified by Employer's vocational counselors as available and suitable, Claimant also applied for a few positions that had been brought to his attention as hiring either by his friends and neighbors or by his review of the *Houma Courier*. (Tr. 22-23, 95; CX 26, p. 1). In February 2005, Claimant applied to Foti Finance and Barry's Wrecker Service. (Tr. 22; CX 26, p. 1). Claimant did not call to check up on any openings with either of these companies since he was told that he would be contacted regarding any openings. (Tr. 93). In March of 2005, Claimant completed an application with Gold Crest Cleaners. (Tr. 22; CX 26, p. 1). Claimant likewise did not call to check up on the status of this application as he was told that he would be contacted. (Tr. 32).

Furthermore, in the weeks prior to the hearing in this matter, Mrs. Himel contacted Tracer on Claimant's behalf to see if there were any job openings. (Tr. 91). The woman who answered the phone at Tracer told Mrs. Himel that there were no current openings but to inquire again in a month or so. (*Id.*). Mr. Himel contacted Vinson Guard Service and Wal Mart again to see if there were then any openings. (Tr. 90-91). L.J. with Vinson Guard Service had Claimant complete an application and told him that he would be in contact with him. (Tr. 91). Dora with Wal Mart told Claimant there was no available opening but to contact her again later. (*Id.*).

Claimant states that he wishes to return to some type of work. (Tr. 40). Claimant appears to me to understand what type of employment he should pursue in light of his injury. Indeed, Employer's own vocational expert, Mr. Nebe, testified that Claimant appeared to be applying for positions that fit within his physical restrictions. (Tr. 84-85). Since his last day of work with Employer, Claimant has shown reasonable diligence in trying to secure suitable alternative employment. Claimant's local Job Service even commented favorably about Claimant's tenacity. (Tr. 77). Although Claimant does not apply for a job every single day since some days he is in more pain than others and sleeps more on some days than

others. (Tr. 94). From the evidence introduced by Claimant, Claimant has shown that he has applied for or inquired about employment with various companies on at least fifteen (15) different occasions. Claimant's evidence also showed that he had been rejected for employment with three (3) of these companies.

Moreover, even though Claimant produced only three (3) rejection letters, Claimant testified that the other companies informed him that they would contact him regarding his application or regarding any openings. While Claimant did not call and follow-up on his application with every company that he applied to, Claimant did periodically check in with at least three of these companies, namely, Vinson Guard Service, Wal Mart, and Tracer Security. Under the circumstances of this case and based on the record as a whole, I find that Claimant satisfied his burden of showing reasonable diligence in securing suitable alternative employment. Accordingly, I find that had Employer met its burden of establishing suitable alternative employment as required by *Turner*, suitable alternative employment has nonetheless not been established as Claimant met his burden of establishing reasonable diligence as required by *Ceres Marine Terminal*.

c. Earning Capacity

Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. See, ***Berkstresser v. Washington Metro. Area Transit Authority***, 16 BRBS 231, 233 (1984).
When an employer presents several different jobs that are available to a claimant, or when a claimant has worked several different jobs, it is appropriate to average the earnings to arrive at a fair and reasonable estimate of the claimant's earning potential. ***Avondale Industries, Inc. v. Pulliam***, 137 F 3d. 326, 328 (5th Cir. 1998); ***Shell Offshore Inc. v. Cafiero***, 122 F.2d 312, 318 (5th Cir. 1997); ***Louisiana Insurance Guaranty Association v. Abbott***, 40 F.3d 122, 129 (5th Cir.1994). Here, however, suitable alternative employment has not been established since Employer failed to meet its burden of establishing suitable alternative employment for Claimant. Therefore, a finding as to Claimant's earning capacity is unnecessary.

E. Conclusion

Claimant is and has been permanently and totally disabled since March 10, 2004. Employer is liable to Claimant for permanent and total disability from March 10, 2004 to present and continuing based on an average weekly wage of $656.62, and a corresponding compensation rate of $437.74.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six percent per annum is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp.***, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co.***, (aff'd in pertinent part and rev'd on other ground); ***Newport News v. Director, OWCP***, 594 F.2d 986 (4th Cir. 1979). However, the Board has now concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 *U.S.C.* §1961 (1982). This order incorporates by reference this statute and provides for its

specific administrative application by the District Director. See, ***Grant v. Portland Stevedoring Company***, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this Decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from June 25, 2003 to March 10, 2004 based on an average weekly wage of $656.62 with a corresponding weekly compensation rate of $437.74.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act for the period from March 10, 2004 to present and continuing based on an average weekly wage of $656.62, and a corresponding compensation rate of $437.74, plus annual cost of living increases pursuant to Section 910(f) effective October 1, 2004 and each October 1 thereafter.

3. Employer shall be entitled to a credit for all previous compensation paid to Claimant.

4. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injury pursuant to Section 7(a) of the Act.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge